16-5-23

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1025.~~ 674

THE FIRST NATIONAL BANK OF YOUNGSTOWN, OHIO, APPELLANT,

vs.

JAMES B. HUGHES, LATE AUDITOR OF MAHONING COUNTY; FREEMAN H. SHERER, PRESENT AUDITOR OF MAHONING COUNTY, AND MONROE W. JOHNSON, PROSECUTING ATTORNEY OF MAHONING COUNTY, OHIO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED OCTOBER 12, 1881.

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1 Pleas in the circuit court of the United States for the northern district of Ohio, eastern division, held at the United States court-rooms, in the city of Cleveland, in the district aforesaid, before the honorable John Baxter, circuit judge for the sixth circuit, and the honorable Martin Welker, district judge for the district aforesaid, on the first day of February, being a day of the January term of said court, in the year of our Lord one thousand eight hundred and eighty-one, and in the one hundred and fifth year of the Independence of the United States of America.

AUGUSTUS J. RICKS, *Clerk.*

2 *Bill.*

To the honorable judges of the circuit court of the United States for the northern district of Ohio:

The First National Bank of Youngstown, Ohio, an incorporated banking association, incorporated by and under the act of Congress of the United States, approved June 3rd, 1864, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," established and having its place of business at the city of Youngstown, Mahoning County, Ohio, in said district, brings this its bill of complaint against James B. Hughes, auditor of the county of Mahoning, in said State, a resident of said city of Youngstown, and a citizen of said State, and Monroe W. Johnson, prosecuting attorney of said county, a resident of said city, and a citizen of said State.

And thereupon your orator complains and says that previous to and on the day preceding the second Monday in April, in the year 1880, your orator was, and has ever since continued, in the business of banking, carrying on such a banking business as is authorized by the said act of Congress approved June 3rd, 1864, having a capital stock of five hundred thousand dollars.

3 And, further complaining, your orator represents and says that previous to, and on the day preceding the second Monday of April in the year 1880, your orator had and has ever since continued to have of deposits of money received by it under the powers given to it by said act of Congress not less than four hundred thousand dollars; that it has employed, and does employ much of the money so received as deposits in the discounting of promissory notes, bills of exchange, and other evidences of debt; and that such deposits have been and are of great value to it and one of the chief sources from which it derives profit.

And, further complaining, your orator respectfully represents that by section fifty-one hundred and forty-one of the Revised Statutes of the United States, being one of the sections of said act of Congress, it is provided that no association incorporated under said act of Congress, shall be subject to any visitorial powers other than such as are authorized by the said act, or are vested in the courts of justice.

And your orator, further complaining, represents and says that by section twenty-seven hundred and eighty-two of the revised statutes of the State of Ohio, now in force, it is provided as follows: "The county auditor, if he shall have reason to believe, or be informed that any person has given to the assessor a false statement of the personal property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, or that the assessor

has not returned the full amount required to be listed in his ward or township, or has omitted, or made an erroneous return of any property, moneys, or credits, investments in bonds, stocks, joint stock companies, or otherwise, which are by law subject to taxation, shall proceed at any time before the final settlement with the county treasurer to correct the return of the assessor, and to charge such persons on the duplicate with the proper amount of taxes; to enable him to do which he is hereby authorized and empowered to issue compulsory process, and require the attendance of any person or persons whom he may suppose to have a knowledge of the articles, or value of the personal property, moneys or credits, investments in bonds, stocks, joint stock companies, or otherwise, and examine such person, or persons, on oath, in relation to such statement or return; and it shall be the duty of the auditor in all such cases to notify every such person before making the entry on the tax-list and duplicate that he may have an opportunity of showing that his statement or return of the assessor was correct, and the county auditor shall, in all such cases file in his office a statement of the facts or evidence upon which he made such correction; but he shall, in no case, reduce the amount returned by the assessor without the written assent of the auditor of state, given on a statement of facts submitted by the county auditor. In all cases in which any person shall make a false statement of the amount of property for taxation to evade the payment of taxes in whole or in part, the person making such false statement shall be liable for and pay all costs and expenses that may be incurred under the provisions of this section, and the same fees and costs shall be allowed and paid as are now or may be allowed by law for similar services; and if not paid shall be collected before any justice of the peace of the proper county by suit in the name of the county commissioners, but in all cases under this section, where the statement shall be found correct, and no intention to evade the payment of taxes, the costs and expenses incurred under this section shall be paid out of the county treasury of the proper county on the order of the county auditor," and that be section twenty-seven hundred and eighty-three of said revised statutes of Ohio, it is also provided as follows:

"Where any person summoned to appear before the county auditor and give testimony under the provisions of the next preceeding section, or in proceedings against companies or corporations required to make return to the county auditor for taxation, shall neglect or refuse to appear, or shall neglect or refuse to answer any question that may be put to him by the auditor touching the matter under examination, the auditor shall apply to the probate judge of the county to issue a subpœna for the appearance of such person before him; and on the application of the county auditor, it shall be the duty of the probate judge to issue a subpœna for the appearance of such person forthwith before him to give testimony, and if any person so summoned shall fail to appear, or appearing shall refuse to testify, he shall be subject to like proceedings and penalties for contempt as witnesses in actions pending in the probate court."

And your orator, further complaining, represents and says that the said James B. Hughes, auditor of said Mahoning County, pretending to act by authority of said section No. 2782, did, on or about the 22nd day of June, 1880, issue and cause to be served upon William H. Baldwin, the cashier of your orator, a written order, commanding the said Baldwin, as such cashier, to appear before said auditor on the 23rd day of June, 1880, and give testimony under said section 2782, and to bring with him the books of account of your orator, showing the amount of

deposits in your orator's bank on the day preceeding the second Monday of April, 1880, and the names of its depositors, and the amount deposited by each.

That in obedience to said order, Robert McCurdy, your orator's president, did appear before said auditor as commanded, and submitted himself as a witness to testify, but did not produce before said auditor said books of account, or any of them, and under advise of counsel refused to produce the same.

7 That, thereupon, the said James B. Hughes, though not objecting, but assenting to the appearance and offer to testify of said Robert McCurdy, in place of said William H. Baldwin, cashier as aforesaid, advised and encouraged thereto, and aided by said Monroe W. Johnson, prosecuting attorney of said Mahoning County, and pretending to act by authority of said section 2783, did, on the 25th day of June, 1880, apply to the probate judge of said Mahoning County to issue a subpœna for the appearance of said William H. Baldwin, as cashier as aforesaid, before said probate judge, and to bring with him said books of account of your orator.

That in compliance with the application of said auditor, the said probate judge did, on said last-named day, issue and cause to be served upon said William H. Baldwin, as cashier of your orator, his subpœna commanding said Baldwin to appear before him to testify and to bring your orator's books of account, showing the amount of deposits in your orator's bank on the day preceeding the second Monday of April, 1880, and the names of its depositors, and the amount deposited by each.

That the said William H. Baldwin is now, as such cashier, under said subpœna commanded to appear before said probate judge and there to produce said books of account of your orator, and the said James

8 B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, threaten that they will, and they are about, to insist before said probate judge that the said William H. Baldwin shall testify under oath as to the amount of deposits in said bank on said day preceeding the second Monday of April, 1880, the names of the depositors and the amount deposited by each, and shall produce your orator's said books of account for the inspection of said auditor and said probate judge; and also threaten that upon the failure of said William H. Baldwin so to testify and produce said books of account they will apply to said probate judge to adjudge said William H. Baldwin in contempt of the probate court and to punish him for the same, and unless restrained by the order of your honorable court, the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, will, by the order of said probate court, and under its penalties for contempt, compel the said William H. Baldwin to produce your orator's books of account for such inspection.

And your orator says that none of the said acts already done by said James B. Hughes and said Monroe W. Johnson, or threaten' to be done by them, and none of the proceedings had by said probate judge are, in any wise, authorized by the said acts of Congress or by any act of Congress; and that the production of your orator's books of account before either said auditor or said probate judge is not

9 authorized by either of said sections of the revised statutes of Ohio or any of the laws of said State; and that all of said acts are prohibited by said section No. fifty-two hundred and forty-one of the Revised Statutes of the United States.

And your orator, further complaining, respectfully says that the necessary result of the said acts so as aforesaid threatened, and about to

be done by said James B. Hughes, auditor, and said Monroe W. Johnson, prosecuting attorney, will be, by unlawfully exposing your orator's business affairs, to lessen public confidence in it as a depository of moneys, and to diminish its deposits and greatly to impair the value of the franchises with which it is invested by said acts of Congress, for all of which injuries the law affords no adequate remedy.

And your orator further represents that it has reason to fear, and does fear, that if it should give notice to said James B. Hughes and Monroe W. Johnson of its intention to make this application to your honors, the injuries from which it now seeks relief might be accomplished before the application could be made.

Inasmuch, therefore, as your orator is remediless by the strict rules of the common law, and relievable only in equity, it prays that the said James B. Hughes, auditor of Mahoning County, Ohio, and
10 Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, may be made parties defendant to this, your orator's bill of complaint; that a writ of subpœna may issue against them, and they may answer in the premises; that your honors will grant unto your orator your honor's writ of injunction, strictly enjoining and restraining, during the pendency of this action, the said James B. Hughes as such auditor, and the said Monroe W. Johnson as such prosecuting attorney, from any further proceeding, or attempt to inspect or to have produced before said auditor or said probate judge, any of the books of account or papers of your orator, and from any and all proceedings or attempts to compel the said William H. Baldwin, cashier of your orator, or any other of your orator's officers or servants, having knowledge of its business affairs, to testify as to the deposit accounts or other accounts of your orator; that upon the final hearing hereof the said James B. Hughes, auditor, and the said Monroe W. Johnson, prosecuting attorney as aforesaid, may be perpetually enjoined from doing any such illegal acts; and that your orator may have such other and further relief in the premises as equity and good conscience require.

By SIDNEY STRONG,
Solicitor for Complainants.

11 UNITED STATES OF AMERICA,
Northern District of Ohio:

Be it remembered that on the 30th day of June, A. D. 1880, before me, a notary public, within and for the county of Mahoning, and State of Ohio, in said district, personally came Robert McCurdy who, being by me sworn, deposes and says that he is the president of the complainant in the foregoing bill of complaint; that he has heard read the said bill, and knows the contents thereof; that all the allegations and statements of fact therein stated as derived from the information of others the believes to be true; and that all other allegations and statements therein contained are true in substance and in fact.

R. McCURDY.

Sworn to before me and subscribed in my presence by said Robert McCurdy on the day last aforesaid.

WILLIAM R. MERRICK,
Notary Public.

Filed July 7th, 1880.

12 *Notice of motion.*

To James B. Hughes, auditor of Mahoning County, Ohio, and Monroe W. Johnson, prosecuting attorney for said county:

Please to take notice that on Wednesday, the 7th day of July instant, at 2 o'clock p. m., or as soon thereafter as counsel can be heard, an application will be made to the honorable Martin Welker, district judge of the United States of America for the northern district of Ohio, at the United States court-house in the city of Cleveland, Ohio, for the allowance of a temporary injunction against both of you in three actions, to be begun in the district court of the United States for said district in chancery against you, one brought by the First National Bank of Youngstown, Ohio, one brought by the Mahoning National Bank of Youngstown, Ohio, and one brought by the Second National Bank of Youngstown, Ohio, as complainants.

The injunctions which will be asked are, that you, as auditor and prosecuting attorney, as aforesaid, respectively be enjoined from all acts, proceedings, and attempts to have produced for the inspection of said James B. Hughes, auditor as aforesaid, or the inspection of the probate judge of said Mahoning County, or before said James B. Hughes, auditor as aforesaid, or before said probate judge, the books of account of the said banks respectively, showing their ac-

13 counts with their respective depositors, and from all acts, proceedings, and attempts to compel the respective cashiers of said banks, or other officers or servants having knowledge in the premises, to testify before said James B. Hughes, auditor, or said probate judge, as to the accounts of depositors in their respective banks.

SIDNEY STRONG,
Solicitor for the first two of the above-named Banks, and in behalf of Jones and Murray, Solicitors for the Second National Bank of Youngstown, Ohio.

We have copy of the above this 5th day of July, 1880.
JAMES B. HUGHES,
Auditor Mahoning County, O.

Filed July 8th, 1880.

Injunction allowed.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio,
vs.
JAMES B. HUGHES, AUDITOR, ET AL.

And afterwards, to wit, on the eighth day of July, A. D. 1880, being a day of the April term of said court, the following order was made in this cause, Hon. Martin Welker, district judge, presiding.

This cause came on to be heard upon the application of the

14 complainant for the allowance of a temporary injunction as prayed for in the bill of complaint filed herein, and the court finding that due notice of this application has been given to defendants herein, and that the complainant is entitled to the relief applied for, it is ordered that upon the giving by complainants of an undertaking conditioned according to law in the sum of $500.00, with surety to the

acceptance of the clerk of this court, that said defendants be enjoined and restrained from in any manner proceeding or attempting to proceed to procure the inspection of said books and papers or either, by said probate judge or by said James B. Hughes, auditor, or by any other person acting for said defendants at any place whatever until the further order of this court.

Injunction bond.

Know all men by these presents that we, The First National Bank of Youngstown, are held and firmly bound unto James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, in the sum of five hundred dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 8th day of July, A. D. 1880.

The condition of the above obligation is such that, whereas
15 the said The First National Bank, of Youngstown, citizen of the State of Ohio, have filed in the circuit court of the United States for the northern district of Ohio, a bill in chancery against the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, and have obtained an allowance of an injunction as prayed for in said bill, from the honorable Martin Welker, one of the judges of said court:

Now, if the said The First National Bank of Youngstown, shall abide the decision of said court in said cause, and pay all moneys and costs which shall be adjudged against it in case the said injunction shall be dissolved, then these presents shall be void; otherwise to remain in full force.

THE FIRST NATIONAL BANK OF YOUNGSTOWN. [SEAL.]
By SIDNEY STRONG, [SEAL.]
Its Attorney.
A. W. JONES. [SEAL.]

Approved and filed July 8th, 1880.

A. J. RICKS, *Clerk.*

Subpœna.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America, to the marshal of the northern district of Ohio, greeting:

16 You are hereby commanded to summon James B. Hughes, auditor of Mahoning County, and Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, if they be found in your district, to be and appear in the circuit court of the United States within and for the district aforesaid, at Cleveland, on the first Monday in August next, to answer a certain bill in chancery, filed and exhibited in said court against them by First National Bank of Youngstown, Ohio.

Hereof they are not to fail under the penalty of the law, thence ensuing, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the United States, this 8th day of July, A. D. 1880, and in the 105th year of the Independence of the United States of America.

A. J. RICKS, *Clerk,*
By E. W. PAGE,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit, in the clerk's office of said court, on or before the first Monday of August, 1880; otherwise the said bill may be taken pro confesso.

A. J. RICKS, *Clerk.*

17 NORTHERN DISTRICT OF OHIO, *ss:*

On the 9th day of July, 1880, I delivered to James B. Hughes, auditor of Mahoning County, a true copy of this writ, at Youngstown, Ohio, and on same day I delivered to Monroe W. Johnson, prosecuting attorney of said county, a true copy thereof at Lowellville, Ohio.

W. F. GOODSPEED, *U. S. M.*,
By GEO. F. BALL, *Deputy.*

(Indorsed:) Returnable August 2nd, 1880. Rule day for appearance Aug. 2nd, 1880. Rule-day for answer Sept. 6th, 1880. Filed July 13th, 1880.

Order of injunction.

UNITED STATES OF AMERICA,
Northern District of Ohio, Eastern Division, ss:

The President of the United States of America to James B. Hughes, auditor of Mahoning County, Ohio, and Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, greeting:

Whereas the First National Bank of Youngstown, Ohio, citizen of the State of Ohio, has filed on the chancery side of the circuit
18 court of the United States, within and for the northern district of Ohio, a bill against James B. Hughes, auditor of Mahoning County, Ohio, and Monroe W. Johnson prosecuting attorney of Mahoning County, Ohio, and has obtained an allowance of an injunction as prayed for in said bill, from the honorable Martin Welker, one of the judges of said court: Now, therefore, we having regard to the matters in said bill contained, do hereby command and strictly enjoin you, the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, from in any manner proceeding, or attempting to compel or enforce the production of the books of account or papers of the First National Bank of Youngstown, Ohio, before either said James B. Hughes, auditor, or the probate judge of Mahoning County, Ohio, or in any manner proceeding or attempting to proceed to procure the inspection of said books and papers, or either, by said probate judge, or by said James B. Hughes, auditor, or by any other person acting for said James B. Hughes, auditor, or Monroe W. Johnson, prosecuting attorney, at any place whatever.

Which commands and injunctions you are respectfully required to observe and obey until our said circuit court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing.

19 Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 8th day of July, A. D. 1880, and in the 105th year of the Independence of the United States of America.

A. J. RICKS, *Clerk*,
By E. W. PAGE,
Deputy Clerk.

NORTHERN DISTRICT OF OHIO, *ss:*

On the 9th day of July, 1880, I made due service of this writ on James B. Hughes, auditor of Mahoning County, Ohio, at Youngstown, Ohio, and Monroe W. Johnson, prosecuting attorney of said county, at Lowellville, Mahoning County, Ohio, by delivering to each a true copy of this writ duly certified.

W. F. GOODSPEED,
U. S. Marshal,
By GEO. F. BALL, *Deputy.*

Filed July 13th, 1880.

Motion to dissolve injunction and dismiss case.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In the United States circuit court for said district. In chancery.

20 THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio, complainant,
vs.
JAMES B. HUGHES, AUDITOR OF MAHONING County, Ohio, and Monroe W. Johnson, prosecuting attorney of Mahoning County, O., defendants.
} Motion to dissolve injunction and to dismiss case.

And now comes James B. Hughes, auditor of said county of Mahoning, and one of said defendants, and moves the court to dissolve the injunction heretofore granted herein, and dismiss said cause, for the following reasons, to wit:

Ist. Because said complainant does not state facts sufficient to constitute a cause of action against said defendants.

IInd. Because said complainant has a full and adequate remedy at law in the court where said original proceedings are now pending, to wit, in the probate court of Mahoning County.

IIIrd. Because said injunction is restraining the proceedings of a State court of competent jurisdiction, which had already obtained jurisdiction of said original proceedings and of said witnesses mentioned in said complaint, and which original proceeding is now pending in said probate court in said Mahoning County.

21 IVth. Because no proceedings, or threats of proceedings, to attach said witnesses for contempt were made or ordered, and no proceedings or threats of proceedings to commit said witnesses for contempt was instituted or threatened in said probate court, said witnesses never having been sworn or interrogated in said court, but appeared therein and filed a motion to dismiss said proceedings by said auditor in said court in which they were subpœnaed to testify, and thereby submitting themselves to the jurisdiction of said probate court.

Vth. Because said complainant is not a party to any proceedings in said probate court wherein said witnesses were subpœnaed and are in no way effected by said proceedings, that this court can take notice of, and are not therefore entitled to ask the relief prayed for.

VIth. Because the statement and allegations in said complaint are not true.

VIIth. Because the court has no jurisdiction to grant the relief prayed for.

M. W. JOHNSON AND
W. C. McFARLAND,
Attorneys for Defendant.

Filed July 19th, 1880.

22 *Motion to dissolve injunction and dismiss case as to def't Johnson.*

THE UNITED STATES OF AMERICA,
The Northern District of Ohio, ss:

In the United States circuit court for said district. In equity.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio, complainants. *vs.* JAMES B. HUGHES, AUDITOR OF MAHONING County, Ohio, and Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, defendants.	Motion to dissolve said injunction and dismiss case as to defendant Johnson.

And now comes Monroe W. Johnson, one of the above-named defendants, and moves the court to dissolve the injunction heretofore granted herein, and dismiss said case as to him, for the following reasons, to wit:

1st. Because he is not a proper party to said suit, and is not a necessary party to the determination of the question involved in said case, or to protect or aid said complainant in seeking its remedy in this court, if it has one. That he appeared only as the attorney of James B. Hughes, auditor in the proceedings attempted to be enjoined by
23 this case, and because the allegations in said complaint are false and untrue as to him, and because the facts set forth in said complaint are not sufficient in law to constitute a cause of action against him.

M. W. JOHNSON AND W. C. McFARLAND,
Attorneys for Defendant.

Filed July 19th, 1880.

Notice of motions.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio, *vs.* JAMES B. HUGHES, AUDITOR OF MAHONING County, Ohio, and Monroe W. Johnson, prosecuting attorney for Mahoning County, O.	Notice of motion to dismiss cause, and dissolve injunction heretofore granted herein.

The said complainant is hereby notified that said defendants, each for himself, by their attorneys, have filed their separate motions in said court to dissolve the injunction heretofore granted against them, and to

dismiss said cause on the following grounds, and for the following reasons, to wit:

24 Ist. Because said Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, is not a proper party to said suit, and is not a necessary party to the determination of the questions involved in said case; or to protect or aid said complainant in seeking its remedy in this court, if it has one. That he appears only as the attorney of James B. Hughes, auditor, in the proceeding attempted to be enjoined by this cause; and because the allegations in said complaint are false and untrue as to him; and because the facts set forth in said complaint are not sufficient in law to constitute a cause of action against him.

IInd. Because said complainant does not state facts sufficient to constitute a cause of action against said defendants.

IIIrd. Because said complainant has a full and adequate remedy at law in the court where said original proceedings are now pending, to wit, in the probate court of Mahoning County, Ohio.

IVth. Because said injunction is restraining the proceedings of a State court of competent jurisdiction, which had already obtained jurisdiction of said original proceedings, and of said witnesses mentioned in said complaint, and which original proceeding is now

25 pending in said probate court of Mahoning County, Ohio.

Vth. Because no proceedings or threats of proceedings to attach said witnesses for contempt were made or ordered, and no proceeding or threats of proceeding to commit said witnesses for contempt was instituted or threatened in said probate court; said witnesses never having been sworn or interrogated in said court, but appeared therein and filed a motion to dismiss said proceedings in said court in which they were subpœnied to testify, and thereby submitted themselves to the jurisdiction of said probate court.

VIth. Because said complainant is not a party to any proceedings in said probate court where said witnesses were subpœnied, and are in no way effected by said proceedings that this court can take notice of, and are not therefore entitled to ask the relief prayed for.

VIIth. Because the statements and allegations in said complaint are not true.

VIIIth. Because the court has no jurisdiction to grant the relief prayed for.

Said motions are set for hearing on the 4th day of August, A.

26 D. 1880, at 2 o'clock p. m., or as soon thereafter as the court can hear the same, and said motions will be heard on affidavits, the records of proceedings before the auditor and probate court of Mahoning County, Ohio, and other evidence.

M. W. JOHNSON, AND
W. C. MCFARLAND,
Att'ys for Def'ts.

We have notice by copy this 23rd day of July, A. D. 1880.
R. MCCURDY,
Pres. First National Bank.

THE STATE OF OHIO,
Mahoning County, ss:

Before me, the undersigned authority, personally came M. W. Johnson, who, being duly sworn, says that, on the 23rd day of July, A. D. 1880, he served the within notice on the within-named complainant

The First National Bank of Youngstown, Ohio, by delivering to R. W. McCurdy, president, a true copy of the within notice at said complainant's bank in Youngstown, Ohio.

M. W. JOHNSON.

Sworn to before me, and signed in my presence this 23rd day of July, A. D. 1880.

JAMES D. SHIELDS,
Deputy Clerk of Common Pleas Court.

Filed July 24th, 1880.

27 *Affidavits in support of motions to dissolve injunction.*

THE STATE OF OHIO,
Mahoning County, ss:

Before me, the undersigned authority, personally came James B. Hughes, auditor of Mahoning County, Ohio, who, being duly sworn, says that he is the James B. Hughes, auditor of Mahoning County, Ohio, who, together with Monroe W. Johnson, prosecuting attorney of said county, are made party defendants in the suit in chancery, commenced by the First National Bank of Youngstown, Ohio, against them in the United States circuit court, northern district of Ohio, in which an injunction has been granted, restraining them from inquiring into the amount and value of the personal property, moneys or credits, investments in bonds, stocks, joint-stock companies or otherwise, which are liable to taxation, within the knowledge or under the control of the said First National Bank of Youngstown, Ohio, of certain persons informed against to this affiant in his official character as auditor, in a proceeding instituted by him in the probate court of Mahoning County, Ohio, in conformity to sec. 2783, of the revised statutes of Ohio.

28 The affiant says the information against the persons whose personal property, moneys, credits, &c., liable to taxation, it was attempted to inquire into, was not made by said Monroe W. Johnson as an individual, or as prosecuting attorney of said county, but said information was made by the boards of equalization, in session prior to said proceedings before said auditor and probate judge, and which information he, as such auditor, was bound to take official notice of, or act in violation of his oath of office; that said Monroe W. Johnson, neither as an individual nor as prosecuting attorney of said county, either advised, encouraged, or aided the said James B. Hughes, auditor as aforesaid, to commence or prosecute any such examination as is heretofore described herein, until called upon by said James B. Hughes, and then utterly refused to go any further than (as is required by sec. 1274 of the revised statutes of Ohio) give his opinion as to the proper construction of sec's 2782 and 2783 of said revised statutes, unless he was regularly retained and employed as an attorney; that he was not thus employed as an attorney for the auditor, until the persons summoned to appear before the auditor refused to give the information asked for; he was employed by said auditor to present his side of the legal question raised to the probate court of said county.

29 The said affiant says that said Monroe W. Johnson, neither as an individual lawyer, nor prosecuting attorney of said county, ever acted in said investigation or proceeding in any other capacity than as the employed attorney of said James B. Hughes, auditor as aforesaid, and should not be made a party defendant to this suit.

The said affiant further says that he was not present at the hearing at

which the temporary injunction heretofore spoken of was granted; that his said attorney Monroe W. Johnson was absent from his office and from the city of Youngstown, Ohio, at the time he, James B. Hughes, was notified of said hearing, and did not get word to him in time for said hearing, but so soon as he was able to see his attorney, the said Monroe W. Johnson, the motion was made to dissolve said injunction, which motion this affidavit is intended to support.

The affiant says further that said Monroe W. Johnson, prosecuting attorney as aforesaid, who is made a party defendant in said suit in the United States circuit court, was never served with a notice of said original application upon which said injunction was granted, but was authorized by this affiant to enter an appearance in said suit and file a motion to dissolve said injunction.

30 The said affiant further says that after the information and complaints had been made to him by the boards of equalization, as before stated, the returns of the assessors of the city of Youngstown, Ohio, and county of Mahoning, Ohio, being all in, he compared the accounts returned by the different banks as deposits, with the amount returned by depositors, and found that an exceedingly small amount was returned by depositors in comparison to the amount returned by the banks as deposits; that a very large amount of taxable property in said city and county was not listed for taxation, and that the tax-payers of said city and county as a whole are greatly injured and defrauded thereby. The affiant says that it is not true "that the necessary result of said investigation will be to unlawfully expose the business affairs of said First National Bank, to lessen public confidence in it as a depository of moneys and to diminish its deposits, and greatly to impair the value of the franchises with which it is invested"; that said First National Bank of Youngstown, Ohio, was not called upon in said investigation, or threatened to be called upon in the same, to expose any of their business but what already been exposed, or should have been by their depositors exposed and publicly made known through the assessors upon their individual statements made under oath.

31 The affiant further says that he did not seek or threaten in said investigation to call for an inspection of the books and papers of said bank, or exercise any visatorial powers prohibited by sec. No. 5241 of the Revised Statutes of the United States; that nothing was done or threatened to be done in said investigation or proceeding but the issuing of a subpœna duces tecum by the probate judge of Mahoning County, Ohio, as authorized by the statutes of Ohio, for the proper officer of said bank to appear and bring with him the book of deposits, not for the purpose of inspecting the same, but for the purpose of enabling said witness, when under oath, to examine and inspect the same himself, and thus be enabled to answer intelligently and truthfully the questions necessary to be asked witnesses in pursuance of said sections 2782 and 2783 revised statutes of Ohio; that, as appears from the record made up in the probate court of said investigation and proceeding, thus far before said auditor and probate judge of said Mahoning County, Ohio, a copy of which is filed herewith, certified to by said probate court, and sworn to by said probate judge and this affiant, the auditor of said county, no proceedings or threats of proceedings to compel said bank or its officer thus subpœnied to present the books or papers of said bank to the said auditor, prose-

32 cuting attorney, or probate judge for inspection or examination; that no proceedings for contempt or threats of proceedings to

compel said witnesses, either by fine or commitment, to bring said books or answer questions were made or had, or could have been made or had, until said witnesses or officers had been called upon to examine and inspect their own books and papers, and answer under oath, truly and intelligently, the interrogatories necessary to be made in pursuance of said secs. 2782 and 2783, revised statutes of Ohio.

That said bank, by its officers or otherwise, was never sworn or interrogated in said investigation in the said probate court, and did not even seek the remedy before said probate judge of objecting to any questions or inquiries and have said objections passed upon by said probate court, but proceeded by motion of the witnesses to irregularly try to dismiss the proceeding on account of its being irregular, as appears more fully from the certified and sworn statement of said probate judge and auditor, as to the proceedings in said probate court filed as before stated herewith.

The said affiant says that all the allegations in the complaint of the said First National Bank of Youngstown, Ohio, wherever it alleges any great or irreparible injury about to be done or threatened
33 to be done said bank, or anything done or threatened to be done for which it has not a competent and adequate remedy, or that any injury of any kind whatever great or small is about to be done or threatened to be done by said James B. Hughes, auditor of Mahoning County, Ohio, Monroe W. Johnson, prosecuting attorney of said county, or the probate judge of said county, are false and untrue; and that said bank has been asked to do nothing or threatened with any injury which if complied with would result in anything but benefit to itself and to the public good. And further deponent saith not.

JAMES B. HUGHES.

Sworn to before me and signed in my presence this 30th day of July, A. D. 1880.

JAMES D. SHIELDS,
Deputy Clerk of Common Pleas Court.

THE STATE OF OHIO,
Mahoning County, ss:

Before me, the undersigned authority, also came Monroe W. Johnson, prosecuting attorney of said county, who being duly sworn, says that he has carefully examined the foregoing affidavit of James B. Hughes, auditor of Mahoning County, Ohio; that the facts therein stated
34 are within his own personal knowledge, and that all of the statements in said affidavit are in substance and in fact true and correct.

MONROE W. JOHNSON.

Sworn to before me, and signed in my presence, this 30th day of July, A. D. 1880.

JAMES D. SHIELDS,
Deputy Clerk of Common Pleas Court.

Filed July 31st, 1880.

Record and affidavits in support of motion to dissolve injunction.

Pleas before the Hon. L. D. Thoman, judge of the probate court, within and for the county of Mahoning, in the State of Ohio, begun and held at the court-house in the city of Youngstown, in and for said county.

In the matter of the examination of the returns of the assessors of the city and township of Youngstown, and county of Mahoning, for the year 1880.

Be it remembered that on the 25th day of June, in the year of our Lord one thousand eight hundred and eighty, in the probate court within and for the county of Mahoning and State of Ohio, James
35 B. Hughes, auditor of Mahoning County, Ohio, filed in court his application in writing for subpœnas duces tecum for J. H. McEwen, cashier, et al., which said application follows, in these words and figures, to wit:

Application.

In the matter of the examination of the returns of the assessors of the city of Youngstown, Ohio, and the county of Mahoning, Ohio, for the year 1880.

YOUNGSTOWN, OHIO, *June* 25th, 1880.

To the Hon. L. D. THOMAN,
Judge of the Probate Court, Mahoning County, Ohio:

SIR: Please issue summons and duces tecum for J. H. McEwen, cashier of the Mahoning National Bank of Youngstown, Ohio, Henry M. Garlick, cashier of the Second National Bank, Youngstown, Ohio. William A. Baldwin, cashier of the First National Bank, Youngstown, Ohio, and Paul Wick and Thomas H. Wilson, cashier, and one of the proprietors of Wick Bros. & Co.'s Bank, Youngstown, Ohio, to appear before your honor, at your office in the court-house, at Youngstown, Ohio, on the 26th day of June, A. D. 1880, at 9 o'clock a. m., and to bring with them the books containing the records of deposits in their respective banks on the day preceeding the 2nd Monday of
36 April, A. D. 1880, and then and there, to answer all questions that may be put to them as required by sec's 2782 and 2783 of the revised statutes of Ohio, of 1880, concerning the value of the personal property, moneys, or credits, investments in stocks, bonds, joint-stock companies or otherwise, which have come to their knowledge or under their control, as appears from said records of deposits on the day preceeding the second Monday of April, 1880, and to answer all questions required by said statutes, which has come to their knowledge or appears from said record of deposits, on the day preceeding the 2nd Monday of April, 1880, and to answer all questions required by said statutes, which has come to their knowledge, or appears from said record of deposits concerning and with reference to the returns of the assessors of the city of Youngstown, Ohio, and county of Mahoning, Ohio, for the year 1880, and concerning the value of moneys and property as aforesaid.

The said parties having been cited to appear before me in conformity to said statutes, but upon their appearance failed to bring with them

said record of deposits, and failed to answer the questions put to them as the law directs, and refused to answer.

JAMES B. HUGHES,
Auditor Mahoning County, Ohio.

37 (J. 15, p. 226.)

JUNE 25TH, 1880.

This day came James B. Hughes, auditor of Mahoning County, Ohio, and filed his application in writing for subpœna duces tecum for J. H. McEwen, cashier of the Mahoning National Bank of Youngstown, Ohio; Henry M. Garlick, cashier of the Second National Bank of Youngstown, Ohio; William H. Baldwin, cashier of the First National Bank of Youngstown, Ohio, and Paul Wick and Thos. H. Wilson, cashier and one of the proprietors of Wick Bros. and Co's. Bank of Youngstown, Ohio.

Thereupon subpœna duces tecum for the above-named witnesses to appear and bring with them the books of deposit of their banks, on the 26th day of June, 1880, at 9 o'clock a. m., to which time this matter is continued.

And on the 26th day of June, in the year of our Lord last aforesaid, the subpœnas duces tecum heretofore issued herein was returned and filed, which said subpœna and return follow in these words and figures, to wit:

Subpœna.

STATE OF OHIO,
Mahoning County, ss:

To J. H. McEwen, H. M. Garlick, W. H. Baldwin, Thos. H. Wilson, and Paul Wick:

38 You are hereby required to attend and bring with you the books containing the records of deposits in your banks, on the day preceeding the second Monday of April, 1880, showing the amount due said depositors on said date, under the penalty of one hundred dollars, before our court of probate, held at the court-house in Youngstown, within and for said county, the 26th day of June, A. D. 1880, at 9 o'clock a. m., to testify all and singular such matters and things as you may know in a certain action in court depending, and then and there to be determined, in the matter of the examination of the returns of assessors for the city of Youngstown and county of Mahoning, Ohio, on information of J. B. Hughes, county auditor.

Witnesses Leroy D. Thoman, judge of our said court, probate, and the seal of said court, at Youngstown, this 25th day of June, A. D. 1880.

[SEAL.] L. D. THOMAN,
Probate Judge.

Sheriffs' return.

THE STATE OF OHIO,
Mahoning County, ss:

Received this writ June 25th, A. D. 1880, and pursuant to its command I served each of the within-named witnesses with a true copy thereof.

JAMES B. DRAKE, *Sh'ff.*
By JOHN H. McGOWN, *Deputy.*

39 And on the 26th day of June, in the year of our Lord last aforesaid, a copy of the original summons heretofore issued in this matter by James B. Hughes, auditor of Mahoning County, Ohio, to the aforesaid witnesses, together with the affidavit of said James B. Hughes, of the service of the same, and his proceedings thereon, was filed in court, which said copy and affidavit follow in these words and figures, to wit:

Copy of original summons.

In the matter of the examination of the returns of the assessors of the city of Youngstown, for the year 1880, on complaint of James B. Hughes, auditor of Mahoning County, Ohio.

YOUNGSTOWN, OHIO, *June 22nd*, 1880.

H. M. Garlick, cashier Second National Bank, Youngstown, Ohio, greeting:

You are hereby notified to appear before the undersigned James B. Hughes, auditor of Mahoning County, Ohio, at court-house in the city of Youngstown, said county, in the chamber of the city council, on the 25th day of June, 1880, at 8 o'clock, as required by law (see Revised Statues of 1880, section 2782 and 2783), there to answer under oath or otherwise, any such questions that may be asked by me, with reference to the returns of the assessors of said city for the year 1880, and concerning the value of the personal property, moneys or credits,
40 investments in bonds, stocks, joint-stock companies or otherwise which have come to your knowledge or under your control on the day preceding the second Monday of April, 1880, belonging to those whose duty it is to list the same for taxation. You are also requested to bring with you the books containing the records of the deposits at said date of the 12th day of last April.

Your prompt compliance with this citation will save the enforcement of attendance as required by said law.

JAMES B. HUGHES,
Auditor of Mahoning County, Ohio.

Affidavit.

THE STATE OF OHIO,
Mahoning County, ss:

Personally appeared James B. Hughes, auditor of Mahoning County, Ohio, who being duly sworn, says that a true copy of the within summons directed to the persons hereinafter named, has been prior to the making of this affidavit, served personally on William H. Baldwin, cashier of the First National Bank of Youngstown, Ohio; Henry M. Garlick, cashier of Second National Bank, Youngstown, Ohio; James M. McEwen, cashier of the Mahoning National Bank, Youngstown, Ohio; Thomas H. Wilson, cashier of Wick Bro's and Co.'s Bank, Youngstown, Ohio; that said parties appeared before him and thereupon said Jas. H. McEwen, under oath, said that certain persons
41 named on the list hereunto attached, headed "Mahoning National Bank," had accounts on the book containing a record of deposits, on the day before the second Monday of April, A. D. 1880, but could not tell who or how much their balances were without his

books of deposits, and refused to bring his said books or record of deposits.

Henry H. Garlick answered under oath that certain persons named in the list hereunto attached, marked "The Second National Bank," had accounts with said bank, but as to amounts and balances, made the same answer as said McEwen, and refused to bring the said books and records of deposits; Robert McCurdy did not refuse to answer any questions asked him that he could, but could not tell the amount due, nor the persons, without his said books, and by advice of counsel refused to bring said books.

Thomas M. Wilson refused to bring his books and answered the same as said McCurdy.

Thereupon said affiant filed his precipe and request in the probate court of Mahoning County, Ohio, asking for subpœnas as required by law.

JAMES B. HUGHES,
County Auditor.

Sworn to before me and signed in my presence this 26th day of June, A. D. 1880.

L. D. THOMAN,
Probate Judge.

42 MAHONING NATIONAL BANK.

Mathew Henkle, James Gibson, John Gibson, Lloyd Booth, O. D. Payne, Mason Evens, T. D. Ford, John Fowler, E. L. Cochran, Benj'n Cunningham, H. O. Bonnell, Scott Bonnell, James Farcher, Booth, Miller, & Co.

SECOND NATIONAL BANK.

B. S. Cunningham, C. H. Andrews, T. D. Ford, W. J. Hitchcock, James Squires, O. D. Payne, Richard Brown, James Cartwright, Fred Hoffman, Booth, Miller & Co., E. L. Cochran.

FIRST NATIONAL BANK.

Manning, McKeown & Co., John Stambaugh, Homer Baldwin, Sam'l Gibson, John Gibson, R. M. Wallace, Seigfried & Lensley, Woodman Bro's. Hiram Park, George Atkins, Sam'l Atkins, Andrews, Hill and Co., Wm. Wirt, John W. Smith, John Fowler, Daniel Reable, B. F. Wirt, Thos. Wells, Jas. T. Wick, T. D. Baldwin, Sam'l Price.

WICK BRO'S & CO. BANK.

Thomas Connell, H. B. Shields, Simon Livinston, John W. Smith, John Gallagher, John Stambaugh, Homer Baldwin, Marg't Wirt, Wm. Wirt,
A. B. Brownlee, Michael Donovan, Straus and Hirshburgh, Thos.
43 H. Wells, James Cartwright, Dr. Buchner, Scott Bonnell, J. H. Bushnell, T. D. Baldwin, Booth, Miller & Co., Sam'l Price.

And on the 26th day of June, in the year of our Lord last aforesaid, H. M. Garlick, by his attorney, A. W. Jones; W. H. Baldwin et al., by

their attorney, Sidney Strong, and Paul Wick et al., by their attorney, T. W. Sanderson, filed in court their motion to dismiss said proceeding; which said motion follows in these words and figures, to wit:

Motion.

In probate court.

In the matter of the examination of the returns of assessors for the city of Youngstown and county of Mahoning, Ohio, on information of J. B. Hughes, co. auditor.

J. H. McEwen, H. M. Garlick, W. H. Baldwin, Thomas H. Wilson, and Paul Wick, jointly and each for himself, moves to dismiss this proceeding and application, for that no circumstances have arisen or exist, or are shown to have arisen, to authorize any action on part of this court.

These parties say jointly, and each for himself says, that they have not neglected or refused to appear before the auditor, neither
44 have they refused or neglected to answer any questions put to them by said auditor, and they say that they have been in no manner in default.

H. M. GARLICK,
By A. W. JONES, *His Attorney.*
W. H. BALDWIN & J. H. McEWEN,
By SIDNEY STRONG, *Their Attorney.*
PAUL WICK,
THOMAS H. WILSON,
By T. W. SANDERSON, *Their Attorney.*

(J. 15, p. 227.)

JUNE 26TH, 1880.

This day, said James B. Hughes, auditor of Mahoning County, Ohio, filed a copy of the original summons issued by him to said witnesses, together with his sworn statement of the service of the same, and his proceedings thereon. Thereupon said witnesses appeared without their books and papers, as ordered in said subpœnas, and by their attorneys made and filed a motion in writing to dismiss this proceeding and application; which said motion was heard and held under consideration until June 28th, 1880, at 9 o'clock a. m., to which time this matter is continued.

(J. 15, p. 233.)

JUNE 28TH, 1880.

This being the day to which this matter was continued, after having heard all the evidence and listened to the arguments of counsel, and carefeully considered the law and the facts as presented, the
45 court overrule said motion; and thereupon, on the motion of said James B. Hughes, said hearing and proceeding is continued until June 29th, 1880, at 9 o'clock a. m.

(J. 15, p. 235.)

JUNE 29TH, 1880.

This day this matter came on for hearing, and by consent of all parties is continued until July 5th, 1880, at 9 o'clock a. m.

(J. 15, p. 240.)

JULY 5TH, 1880.

This day this matter came on for hearing, and by consent of all parties is continued until July 12th, 1880, at 9 o'clock a. m.

(J. 15, p. 250.)

JULY 12TH, 1880.

Proceedings having been commenced in the United States circuit court for the northern district of Ohio, by injunction, this matter is continued until the 6th day of August, 1880, at 9 o'clock a. m.

THE STATE OF OHIO,
Mahoning County, ss:

I, Leroy D. Thoman, judge of the probate court within and for the county and State aforesaid, hereby certify the above, within, and foregoing to be a full, true, and correct copy of the proceedings had in this court, in the matter of the examination of the returns of the as-
46 sessors of the city and township of Youngstown and county of Mahoning, for the year 1880, as taken from the records of this court.

And I further certify that I am judge of the probate court of said county and State, duly elected, commissioned, and sworn, and as such am ex-officio clerk of the same, and have the charge and custody of the seal of said court, and, further, that the foregoing certificate is in due form of law.

As witness my hand and the seal of said court, as given at Youngstown, this 29th day of July, A. D. 1880.

[SEAL.] L. D. THOMAN,
Judge of Probate Court, and ex-officio Clerk of same.

THE STATE OF OHIO,
Mahoning County, ss:

Before me, the undersigned authority, personally came James B. Hughes, auditor of Mahoening County, Ohio, and Leroy D. Thoman, probate judge of said county, who being duly sworn, say, the within copy of the record, in the matter of the examination of the returns of the assessors of the city of Youngstown, Ohio, and the county of Mahoning, Ohio, is a true and correct statement of all the proceedings had thus far, before the said auditor and probate judge in the examination of witnesses as to personal property, moneys, credits, &c., not listed for taxation according to law.

JAMES B. HUGHES,
L. D. THOMAN.

47 Sworn to before me, and signed in my presence, this 30th day of July, A. D. 1880.

JAMES D. SHIELDS,
Deputy Clerk of Mahoning Common Pleas Court.

Filed July 31st, 1880.

Demurrer.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In the United States circuit court for said district.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, OHIO, complainant,
vs.
J. B. HUGHES AND W. M. JOHNSON, DEFENDANTS.
} Demurrer.

And now come the defendants in this action, and demur to the complainants' bill of complaint filed herein, because said complaint does not state facts sufficient to constitute a cause of action against them.

M. W. JOHNSON AND
W. C. MCFARLAND,
Atty's for Defendants.

Filed Sept. 6th, 1880.

48 And afterwards, to wit, on the 4th day of October, A. D. 1880, being a day of the April term of said court, the following order was made in this cause:

This cause is continued until the next term of this court.

And afterwards, to wit, on the 3rd day of January, A. D. 1881, being a day of the October term of said court, the following order was made in this cause:

This cause is continued until the next term of this court.

Motion of F. H. Sherer asking to be made a party defendant.

THE UNITED STATES OF AMERICA,
The Northern District of Ohio, ss:

Eastern division. In equity.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio, complainant,
vs.
JAMES B. HUGHES, AUDITOR OF MAHONING County, Ohio, et al., defendants.
} Motion.

To the honorable judges of the circuit court for said northern district of Ohio:

49 F. H. Sherer, a resident of said county of Mahoning and State of Ohio, now comes and represents to this honorable court that since the filing of the said complainant's bill herein the term of office of the said defendant James B. Hughes, auditor of said Mahoning County, has expired; that at the annual election held in the State of Ohio, on the second Tuesday of October last past, he was duly elected auditor of said Mahoning County, and that he has since duly qualified as such officer, and is now legally in possession of said office, and the records thereof, as the successor of the said defendant Hughes; that he is a necessary and proper party to the record in this case.

He therefore prays the court that an order may issue requiring the complainant to take the necessary and legal steps to make him a party defendant to this proceeding.

M. W. JOHNSON, AND
W. C. McFARLAND,
Atty's for said F. H. Sherer.

Filed Jan. 13th, 1881.

And afterwards, to wit, on the 13th day of January, A. D. 1881, being a day of the January term of said court, the following order was made in this cause:

In this cause, on application and motion of F. H. Sherer, present
50 auditor of Mahoning County, it is ordered that the complainant make said Sherer, auditor as aforesaid, a party defendant, by a supplemental bill to be filed within ten days.

Supplemental bill.

In the circuit court of the United States for the northern district of Ohio. In chancery.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio, complainant,
vs.
JAMES B. HUGHES, AUDITOR OF MAHONING County, and another respondent.
} Supplemental bill of complaint.

The said complainant, The First National Bank of Youngstown, now comes, in obedience to the order of the court in that behalf, and for its supplemental bill of complaint, represents that heretofore and since the filing of the original bill of complaint herein, the term of office of said James B. Hughes, as auditor of said Mahoning County, has by limitation expired, and he has ceased to perform the duties of and to hold said office; that one Freeman H. Sherer has been duly elected as the successor of said James B. Hughes in said office, and that said Freeman H. Sherer has duly qualified as such auditor, and has entered upon and is now performing the duties of said office.

51 And, further complaining, your orator represents that unless restrained therefrom by the order of injunction of your honors, the said Freeman H. Sherer, as such auditor, is about to do and will do all and singular the matters and things which in said original bill of complaint it was alleged were at the date thereof about to be done by said James B. Hughes; that if such acts be done by said Freeman H. Sherer, your orator will suffer all and singular the loss and damage alleged in said original bill of complaint, and that for such loss and damage the law affords no adequate remedy.

Your orator therefore respectfully prays your honors that the said Freeman H. Sherer, as auditor as aforesaid, may be made a defendant herein in place of said James B. Hughes; that a writ of subpœna may issue against him, and he may answer in the premises, and that all and singular the relief asked in said original bill of complaint against said James B. Hughes, and all to which your orator may in the premises be entitled, may be granted to your orator against said Freeman H. Sherer, auditor as aforesaid.

By SIDNEY STRONG,
Solicitor for Complainant.

52 UNITED STATES OF AMERICA,
Northern District of Ohio:

Be it remembered that on the 22nd day of January, 1881, before me, a notary public within and for the county of Mahoning and State of Ohio, in said district, personally came Robert McCurdy, who, being by me sworn, deposes and says, that he is the president of the complainant in the foregoing supplemental bill of complaint; that he has heard read the said bill, and knows the contents thereof; that all the allegations and statements of fact therein stated, as derived from the information of others, he believes to be true; and that all other statements and allegations therein contained are true in substance and in fact.

R. McCURDY.

Sworn to before me and subscribed in my presence by said Robert McCurdy on the day last aforesaid.

WILLIAM R. MERRICK,
Notary Public.

I, Freeman H. Sherer, do hereby waive the issue and service of process in this case, and enter my appearance herein.

FREEMAN H. SHERER,
By W. C. McFARLAND,
His Att'y.

JAN. 24TH, 1881.

53 *Decree.*

And afterwards, to wit, on the first day of February, A. D. 1881, being a day of the January term of said court, the following decree was made in this cause:

Hon. John Baxter, circuit judge, presiding.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, Ohio,
vs.
JAMES B. HUGHES, AUDITOR OF MAHONING County, Ohio, et al.
} In chancery.

This cause came on to be heard upon the motion of the defendants to dissolve the injunction heretofore allowed and issued herein, and thereupon, upon the allegations of the bill of complaint alone, and without hearing affidavits or testimony in support of said motion, the court sustains said motion, and orders that such injunction be dissolved.

And thereupon said cause comes on for hearing on the demurrer herein filed by defendants to said bill of complaint, and upon consideration the court sustains said demurrer, and thereupon

The court further orders, adjudges, and decrees that said bill of complaint, and this suit, be finally dismissed at the costs of complainant.

(To each and all of said action, orders, and decrees of the court, the complainant, by its counsel, then and there excepted.)

54 And afterwards, to wit, on the 10th day of March, A. D. 1881, being a day of the January term of said court, the following order was entered in this cause:

In this cause The First National Bank of Youngstown, Ohio, having appeared in open court, by counsel, and prayed an appeal to the next term

of the Supreme Court of the United States from the final decree rendered in this cause on the first day of February, 1881, and having this day filed their appeal bond in the sum of two thousand dollars, conditioned as required by law, with sureties to the satisfaction of the court, said prayer for appeal is hereby allowed, and citation may issue accordingly.

Appeal bond.

Know all men by these presents that we, The First National Bank of Youngstown, Ohio, as principal, and , as surety, are held and firmly bound unto Freeman H. Sherer, auditor of Mahoning County, Ohio, and his successors in office, Monroe W. Johnson, prosecuting attorney, Mahoning County, and James B. Hughes, auditor, Mahoning County, in the sum of two thousand dollars, to the payment whereof well and truly to be made, we bind ourselves, our heirs, execu-
55 tors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this tenth day of March, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-bounden First National Bank of Youngstown, Ohio, has appealed to the next Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, bearing date the first day of February, A. D. 1881, in a cause wherein the said First National Bank of Youngstown, Ohio, was complainant, and the said James B. Hughes, as auditor, and Freeman H. Sherer, as his successor et al., were respondents:

Now, therefore, the condition of this obligation is such that if the above-named appellant, The First National Bank of Youngstown, shall prosecute its appeal with effect, and pay all such damages, costs, and expenses as shall be awarded against it, as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

FIRST NATIONAL BANK OF YOUNGSTOWN, O.,
By R. MCCURDY. [SEAL.]
SIDNEY STRONG. [SEAL.]

Sealed and delivered in presence of—
H. M. GARLICK.

Approved and filed March 10th, 1881.
(Signed) M. WELKER, *Judge.*

56 The United States of America to James B. Hughes, auditor Mahoning County, Ohio; Freeman H. Sherer, present auditor Mahoning County, Ohio; and Monroe W. Johnson, prosecuting attorney Mahoning County, Ohio, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed by the circuit court of the United States for the eastern division of the northern district of Ohio, wherein The First National Bank of Youngstown, Ohio, is appellant and you are appellees, to show cause, if any there be, why the final decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Martin Welker, district judge of the United

States, holding circuit court for said district, this 10th day of March, in the year of our Lord one thousand eight hundred and eighty-one.

M. WELKER.

57 THE UNITED STATES OF AMERICA,
Northern District of Ohio, Mahoning County, ss:

On this 25th day of March, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared William R. Merrick before me, the subscriber, Tod Ford, a notary public within and for said county, and makes oath that he delivered a true copy of the within citation to the within-named James B. Hughes and Freeman H. Sherer on the 14th day of March, 1881, and that on the 24th day of March, 1881, he delivered a true copy of the within citation to the within-named Monroe W. Johnson.

WILLIAM R. MERRICK.

Sworn to and subscribed the 25th day of March, A. D. 1881.

[SEAL.] TOD FORD,
Notary Public.

(Indorsed:) No. 3996. Filed Mar. 26, 1881. A. J. Ricks, clerk.

58 *Opinion of court.*

In the United States circuit court at Cleveland, Ohio.

FIRST NATIONAL BANK OF YOUNGSTOWN
vs.
JAMES B. HUGHES, AUDITOR, & MONROE W. JOHNSON, prosecuting attorney, &c.

The complainant is a national bank, organized under the act of Congress, and has its place of business in Youngstown, Mahoning County, Ohio.

It complains of James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney of said county, and charges that previous to and on the second Monday of April, 1880, it was and has ever since been engaged in the business of banking, authorized by law, and that it then had, and has continued to have, not less than $400,000 of deposits, which it employed in its business, and from which it derived profit; protesting that "it is not subject to any visitorial powers other than such as are authorized by said act of Congress or vested in the courts of the country," it proceeds to complain "that the said James B. Hughes, auditor of Mahoning County, pretending to act by authority of section 2782 (Revised Statutes of Ohio), did, on or about the 22nd day
59 of June, 1880, issue and cause to be served upon William H. Baldwin, the cashier of your orator, a written order commanding the said Baldwin, as such cashier, to appear before said auditor on the 23rd June, 1880, and give testimony under said section 2782, and to bring with him the books of account of your orator, showing the amount of deposits in your orator's bank on the day preceeding the second Monday of April, 1880, and the names of its depositors, and the amount deposited by each." "That in obedience to said order Robert McCurdy, your orator's president, did appear before said auditor, as commanded, and submitted himself as a witness to testify, but did not produce before said auditor said books of account, or any of them, and under advice of counsel refused to produce the same." "That there-

upon the said James B. Hughes, though not objecting but assenting to the appearance and offer to testify of said Robert McCurdy in place of said William H. Baldwin, cashier as aforesaid, advised and encouraged thereto, and aided by the said Monroe W. Johnson, prosecuting attorney of said Mahoning County, and pretending to act by authority of section 2782 (Revised Statutes of Ohio), did, on the 25th day of June, 1880, apply to the probate judge of said Mahoning County to issue a subpœna for the appearance of the said William H. Baldwin, as cashier as aforesaid, before said probate judge, and to bring with him said books of account of your orator," and "that in compliance with the
60 application of said auditor, the said probate judge did, on said last-named day, issue and cause to be served upon said William H. Baldwin, as cashier of your orator, his subpœna, commanding said Baldwin to appear before him to testify, and to bring your orator's books of account showing the amount of deposits in your orator's bank on the day preceeding the second Monday of April, 1880, and the names of its depositors, and the amount deposited by each; that the said William H. Baldwin is now, as such cashier, under said subpœna commanded to appear before said probate judge, and there to produce said books of account of your orator, and the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, threaten that they will, and they are about to, insist before said probate judge that the said William H. Baldwin shall testify under oath as to the amount of deposits in said bank on said day, the names of depositors, and the amount deposited by each, and shall produce your orator's said books of account for the inspection of said auditor and said probate judge; and also threaten that upon the failure of said William H. Baldwin so to testify and produce said books of account, they will apply to said probate judge to adjudge said William H. Baldwin in contempt of the probate court, and to punish him for the same; and, unless restrained, the said James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, will, by the order of the said probate court, and
61 under its penalties for contempt, compel the said William H. Baldwin to produce your orator's books of account for such inspection."

Complainant avers "that none of said acts done or threatened to be done" by defendants, "and none of the proceedings had by said probate judge are in any wise authorized by said act of Congress, or by any act of Congress; and that the production of your orator's books of account before either said auditor or said probate judge is not authorized by either of said sections of the printed statutes of Ohio, or any of the laws of said State, and that all of said acts are prohibited by section 5241 of the Revised Statutes of the United States, and that the necessary result of said acts, so as aforesaid threatened and about to be done, will be, by unlawfully exposing your orator's business affairs, to lessen public confidence in it as a depositor' of money, and to diminish its deposits, and greatly impair the value of the franchise with which it is invested."

Upon these allegations, duly verified by the oath of its president, the complainant prayed for an injunction to restrain the defendants, James B. Hughes, auditor, and Monroe W. Johnson, prosecuting attorney, "from any further proceedings or attempts to inspect or have produced before said auditor or said probate judge any of the books of ac-
62 count or papers of your orator, and from any and all proceedings or attempts to compel the said William H. Baldwin, cashier of

your orator, or any other of your orator's officers or servants having knowledge of its business affairs, to testify as to the deposit accounts, or other accounts of your orator."

A preliminary injunction was granted. Defendants now appear and demur, and move to dissolve the injunction.

The auditor was, as we understand the case stated by the complainant, proceeding under and in exact accordence with §§ 2782 and 2783 of the Revised Statutes of Ohio.

These sections charge him with the duty of making correct tax duplicates of personal property, taxable under the laws of the State, and to enable him to discharge the responsible and delicate trust thus imposed on him, he is authorized and commanded in case he has reason to believe or shall be informed that any person liable to such tax has made a false return to the assessor, to proceed to correct such return and charge the delinquent on the duplicate with the true amount for which he is liable; and to this end he is authorized to issue compulsory process, require the attendance of witnesses, and examine them on oath. But if any person so summoned shall neglect or refuse to attend, or appearing refuse to answer any lawful question propounded to him, the auditor is commanded to apply to the probate judge of the
63 county to issue a subpœna for such contumacious witness to appear and give evidence before said probate judge; and in the event any person or persons so summoned by the probate judge shall fail to appear, or appearing shall refuse to give testimony, he shall be subject to like proceedings for contempt as defaulting witnesses duly summoned in actions pending in said probate court.

The complainant insists, 1st, that it is protected from the proposed investigation by section 5241 of the United States Revised Statutes. This section provides that no association (meaning national banking association) shall be subject to any visitorial powers other than such as are authorized by this title (63), or are vested in the courts of the country.

But does the defendants, or either of them, propose the exercise of visitorial authority? We think not. Visitation in law is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business and enforce an observance of its laws and regulations.

Borrill defines the word to mean "inspection, superintendence, direction, regulation."

The exercise of no such authority is contemplated by defendants; they do not contemplate inspection, supervision, or regulation of complainant's business, or an enforcement of its laws or regulations.
64 On the contrary their purpose is to ascertain, in a legal way and by legitimate testimony, whether any person had at the time mentioned on deposit with complainant, any money subject to taxation in said county, which had not been returned by the owners thereof for that purpose. Hence the subpœna commanding the production of the complainant's books in the manner and for the purpose stated, is not an exercise of "visitorial powers," and it follows that the witness is not protected by said section from amenability to the probate court for his contempt in disobeying its mandate.

But the complaint insists, 2ndly, "that the proposed enforced exhibition of its books will expose its business, lessen public confidence, diminish its deposits and consequent profits, and impair the value of its franchise."

We fail to see any sufficient reason for such grave apprehensions;

but if complainant's fears were well founded the State might still be entitled to the testimony demanded. Private rights must, to a reasonable extent, yield to the public necessities. It is on this ground that witness, possessing knowledge of facts material to the vindication of the rights of another, may be compelled by judicial process to appear and give evidence in behalf of that other party, notwithstanding the evidence thus coerced may uncover the witnesses private business and subject him to a civil action for damages. Such a witness thus duly
65 summoned is even bound to make extraordinary efforts to attend. (People vs. Davis, 15 Wend, 620.) For like reasons and upon the same principles, persons in possession of written evidence, of whatever character, may be required to produce the same to be used as evidence, and it is no ground for the refusal of a witness to produce books or papers, when required by lawful authority, that they are private. (Barnham vs. Morrissey, 14 Gray, 226.) Now if the courts are thus careful to assist private persons in procuring evidence for the maintainance of their individual rights, why should the same power not be exerted in behalf of the public? Is the State which represents the body politic entitled to less consideration than its humblest citizen? No State can maintain its existence without revenue—a burden imposed by law on every one for the benefit of all. This burden ought to be equal and uniform, and the legislature requires the officers charged with the duty of making assessments for the purpose of taxation to enforce this just and beneficient will, and among other powers conferred to enable them to do so, auditors are authorized to summon witnesses and examine them on oath. These enactments are resonable, necessary, and just. The auditors, selected for their supposed intelligence and impartiality, act officially in the execution of these laws, and it is the duty of every citizen, when sum-
66 moned, to respond and freely communicate all the information he may possess necessary to a full and impartial assessment of property for taxation. But it is not incumbent on us to define the duty of the witness in the premises. When he refused to obey the auditor's subpœna, jurisdiction of the controversy, on the auditor's application to the probate judge to issue his subpœna, commanding the witness to appear and give evidence before him, passed to and vested in the probate court; and hence, if the witness has any valid and sufficient excuse for his alleged contumacy, he must present and insist upon it before that tribunal. But the complainant replies for the witness, that while the probate court has jurisdiction generally of controversies of this character, it has not such jurisdiction in cases in which national banks are parties; because, as it contends, the proceeding contemplated is in violation of their chartered rights.

This objection has been disposed of; but if we concede complainant's claim of exemption, etc., the responsibility of deciding the question is with the probate court, and not with us.

The plain meaning of the bill, however, is, that the probate court will make an erroneous decision. Possibly it may. All courts are liable to err. But the possibility that it may err imparts to this court no authority to supervise its action. There are cases which, at the instance of a party, may be transferred from a State to a Federal
67 court, but this is not one of them. If it was, no attempt has been made to bring it here. The probate court still retains its jurisdiction of the case, and we cannot stay its action or incroach upon its authority without violating a positive act of Congress. "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such in-

junction may be authorized by any law relating to proceedings in bankruptcy." (United States Revised Statutes, § 720.) And the Supreme Court, in the very last case before it, involving an interpretation of this statute, says, "Except where otherwise provided by the bankrupt law, the courts of the United States are expressly prohibited by section 720 of the Revised Statutes from granting a writ of injunction to stay proceedings in a State court." (Hains vs. Carpenter, 1 Otto, 254.)

We must, therefore, remit complainant to the probate court for such action as that court may, after due consideration, feel bound to take.

The injunction will be dissolved, defendant's demurrer will be sustained, and complainant's bill dismissed with costs.

BAXTER, *Judge, &c.*

68 *Certificate.*

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Augustus J. Ricks, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The Mahoning National Bank of Youngstown, Ohio, is the complainant, and James B. Hughes, auditor of Mahoning County, Ohio, Freeman H. Sherer, successor, auditor, and Monroe W. Johnson, prosecuting attorney of Mahoning County, Ohio, are the defendants, as the same appears from the files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Cleveland, in said district, this 30th day of April, A. D. 1881, and in the 105th year of the Independence of the United States of America.

[SEAL.] AUGUSTUS J. RICKS, *Clerk.*

(Indorsement on cover:) No. 1025. The First National Bank of Youngstown, Ohio, appellant, vs. James B. Hughes, auditor of Mahoning County, Freeman H. Sherer, present auditor, and Monroe W. Johnson, prosecuting attorney. N. Ohio, C. C. U. S. Filed 12th October, 1881.

FILED
APR 10 1882

IN THE

Supreme Court of the United States.

No. 1025.

The First National Bank of Youngstown, Ohio,
APPELLANT,

vs.

James B. Hughes, late Auditor, Freeman H. Sherer, present Auditor of Mahoning County, Ohio,

AND

Monroe W. Johnson, Prosecuting Attorney of Mahoning County, Ohio,
APPELLEES.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

BRIEF FOR APPELLEES.

W. C. McFARLAND,
Counsel for Appellees.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK OF YOUNGSTOWN, OHIO,
Appellant,
vs.
JAMES B. HUGHES, Auditor, FREEMAN H. SHERER, present Auditor, and MONROE W. JOHNSON, Prosecuting Attorney of Mahoning County, Ohio,
Appellees.
No. 1025.

MOTION TO DISMISS, ETC.

1. The Appellees, James B. Hughes, Auditor, Freeman H. Sherer, present Auditor, and Monroe W. Johnson, Prosecuting Attorney of Mahoning County, Ohio, now come and move the Court to dismiss the appeal in this case for want of jurisdiction of this Court, and also to affirm the decree of the Court below, on the ground that although this Court has jurisdiction it is manifest the appeal was taken for delay only.

2. Appellees further move the Court to take this case up out of its order, and decide it upon the merits of the record at once, if the Appellees' motion to dismiss is not granted, for the reason that the pendency of this suit prevents the Auditor and Probate Court of Mahoning County, Ohio, from proceeding to ascertain the amount of personal property owned by certain individuals subject to taxation under the laws of Ohio, and thus prevents and delays the collection of the revenues of the State.

W. C. McFARLAND,
For Appellees.

BRIEF.

It will not be necessary to make a statement of the facts, disclosed in the Bill of Complaint, because the Bill will be found printed in the record (page 1) and the facts therein stated, in the opinion of Judge Baxter, on page 24, to which opinion I refer the Court.

The first question raised by the motion is, *Had the Court below jurisdiction?* If it had not, as the Supreme Court can only obtain jurisdiction through that Court; this Court has no jurisdiction, and the motion should be sustained.

This question was raised by Appellees' demurrer in Court below (see page 20 of the record), and also by their motions

to dissolve the injunction and dismiss the case. (See pages 8 and 9 of record.

By reference to the decree entered upon the journal (see page 22 of record) it will be seen that Judge Baxter sustained the motion to dissolve the injunction, and also the demurrer, on the ground that the Bill of Complaint "did not state facts sufficient to constitute a cause of action." It is from this decision that appellant appeals.

The proceeding was begun by the Auditor under Section 2782 of the Revised Code of Ohio, 1880, the substance of which is correctly set forth in the Bill of Complaint. (See pages 1 and 2 of record.)

The persons connected with the Bank being subpœnaed before the Auditor, came and refused to answer, because they said they could not without the books. This was clearly evasive. Thereupon the Auditor began a proceeding, as provided in Section 2783 of Revised Statutes of Ohio, in the Probate Court; which section reads as follows:

"When any person summoned to appear before the County "Auditor and give testimony, under the provisions of the "next preceding section, or in proceedings against companies "or corporations required to make return to the County Aud- "itor for taxation, shall neglect or refuse to appear, or shall "neglect or refuse to answer any question that may be put to "him by the Auditor touching the matter under examination, "the Auditor shall apply to the Probate Judge of the county "to issue a subpœna for the appearance of such person before

"him; and on the application of the County Auditor it shall "be the duty of the Probate Judge to issue a subpœna for "the appearance of such person forthwith before him to give "testimony; and if any person so summoned shall fail to "appear, or appearing shall refuse to testify, he shall be sub-"ject to like proceedings and penalties for contempt as wit-"nesses in actions pending in the Probate Court."

As averred in the Bill of Complaint, a subpœna *ducus tecum* was issued by the Probate Court upon application of the Auditor, and served upon the witness who was cashier of the appellant, and instead of appearing and answering, he procured the Bank to begin proceedings in the Circuit Court of the United States at Cleveland to enjoin the Auditor and Prosecuting Attorney from proceeding further with the cause they had begun in the Probate Court.

Now what I claim is, *that this was a cause then pending in the Probate Court of Mahoning County, Ohio, and that the Probate Court had sole jurisdiction of the case.* That Court is expressly authorized by the Ohio Statute to punish for contempt, any witness properly subpœnaed if he shall neglect or refuse to appear and answer. It was a judicial proceeding as much as if a hearing was being had upon exceptions to the account of a trustee appointed under a will.

Section 720, of the Revised Statutes of the United States, reads as follows: "The writ of Injunction shall not be "granted by any Court of the United States to stay proceed-"ings in any Court of a State, except in cases where such in-

"junction may be authorized by any law relating to proceed-
"ings in bankruptcy."

The allowance of the injunction, which issued from the Circuit Court at Cleveland, was clearly in the face of this provision of law.

Is not the Probate Court a State Court, and were not the proceedings therein "stayed," and was not that the object of the application to the United States Court?

The Supreme Court in deciding the case of *Hains vs. Carpenter*, 1 *Otto*, 254, say, "Except when otherwise provided by the bankrupt law, the Courts of the United States are expressly prohibited by section 720 of the Revised Statutes from granting a writ of injunction to stay proceedings in a State Court."

The same principle has been frequently held in the Courts of the States and United States.

"A State Court has no jurisdiction to enjoin a judgment of a Circuit Court of the United States."

McKim vs. Voorhees, 7 *Cranch* 279; *also* 4 *Cranch*, 179.

"A Court of Chancery will not by injunction restrain a writ or proceeding previously commenced in a court of a sister State, or in any of the Federal Courts."

Mead vs. Merritt & Peck, 2 *Paige Chancery*, 402; *also* 8 *Paige*, 440.

"No Court in this State can rightfully enjoin a defendant from proceeding in a suit in another Court of the State having equal power to grant the relief sought by the complainant."

Grant vs. Quick, 5 *Sandford*, 612.

The authority of a Court to issue subpœnas for persons, carries with it, by implication, the authority to send for books and papers in the custody of the witness.

It is claimed in complainant's Bill that the complainant was, by this proceeding of the Auditor, being subjected to "visitorial powers," and this is one of the grounds upon which the injunction is prayed for.

That clause of the section, 5241, United States Revised Statutes, prohibiting visitorial powers, reads as follows: "No "association (meaning National Banking associations) shall "be subject to any visitorial powers other than such as are "authorized by this title, or are vested in the Courts of "Justice."

This law itself not only does not prohibit Courts of Justice from making enquiry into the affairs of national banks, but expressly recognizes the right of "Courts of Justice," such as this was and in such cases to do so; else what sense is there in the clause "or are vested in the Courts of Justice." This does not mean federal courts, but any legal courts. The law of Ohio invested the power in the Probate Court in such cases to issue subpœnaes for persons and books and papers, and this case comes clearly under the above exception.

If I am right in the position that the Probate Court of Mahoning County had obtained jurisdiction of the subject matter and persons, then it follows that that Court alone had jurisdiction, otherwise the proceeding in the United States Circuit Court would amount to the removal of the cause from the State Court to the United States Court in a different way than that provided by the Revised Statutes of the United States.

This proceeding for injunction is simply a removal of the proceeding from the State to the United States Court. This may be done in certain cases but this is not one of them.

The theory upon which the complainants below acted, seems to have been that the United States Courts alone have jurisdiction in cases by and against National Banks.

While the United States Courts have jurisdiction, so also have the State Courts, and that Court which obtains it first is the Court in which the suit must be tried unless it is removed, as it may be in certain cases.

Was not the Auditor, under the laws of Ohio, acting in a judicial capacity? I doubt if the complainant could have removed the case to the United States Court in the way proposed, if application had not been made to the Probate Judge, but certainly after it passed into the Probate Court it could not be done.

II.

The foregoing argument is addressed wholly to the question of jurisdiction of the Circuit Court at Cleveland.

We now come to the second question raised by the motion:

HAS THE SUPREME COURT JURISDICTION UPON APPEAL?

Sec. 692 of Revised Statutes of the United States reads as follows:

"An appeal shall be allowed to the Supreme Court from "all final decrees of any Circuit Court, or of any District "Court acting as a Circuit Court in cases of equity and of "admiralty and maritime jurisdiction, when the matter in "dispute, exclusive of costs exceeds the sum or value of five "thousand dollars."

There is no allegation in the bill of complainant that the matter in dispute amounts to five thousand dollars, and there are no facts stated in the Record which will justify the Court in presuming that any sum in money would be lost if the Court refused to grant the injunction prayed for.

In fact if you look into the Bill itself you will see, (page 4 of the record,) that the only loss it alleges it will suffer will be by "exposing your orator's business affairs, to lessen public "confidence in it as a depository of moneys, and to dimish its "deposits, and greatly impair the value of the franchises with "which it is invested by said acts of Congress, for all of "which injuries the law affords no adequate remedy."

There is nothing in the case which brings it within the exceptions found in subsequent sections.

So that the judgment of the Circuit Court was conclusive.

III.

The motion in this case is alternative. It asks first that the case be dismissed for want of jurisdiction, but if the Court finds that this case is rightfully here, it then asks that the case be taken up out of its order and disposed of at once inasmuch as it prevents the Auditor from proceeding with the enquiry begun, to ascertain whether false returns have been made by certain citizens of Mahoning County, Ohio, to the assessors, and thus prevents and delays the collection of the revenues of the State.

See Rule of the Supreme Court No. 26 - clause 4 -

The case in the Probabte Court stands continued awaiting a decision in this case, and this Court has never refused to take a case up out of its order involving the right to collect taxes or assessments levied or attempted to be levied upon the property of Citizens of a State, or United States, or National Banks.

I shall therefore, proceed to examine the Bill of Complaint to see if the Court was right in sustaining the motion to dissolve the injunction, and in sustaining the demurred.

The Banks had no right to withhold the information and testimony contained in its Books.

I have already shown that the Probate Judge was not attempting the exercise of "visitorial powers"—but was proceeding according to law.

If not, then is it a fact that "the value of the Complainants franchises would be impaired, and its deposits diminished, and that it had no adequate remedy at law." This is the only other allegation in the Complaint upon which it asks an injunction, and if there is nothing in this allegation the motion to dissolve and the demurrer were properly sustained.

If this proceeding was leveled against the depositors of one bank alone, and could not as well be brought against depositors of other banks, it might have this effect to diminish its deposits, but inasmuch as the Auditor could pursue the depositors who were trying to hide away their money from taxation to other banks, I cannot see how a person would be advantaged by removing his deposits to another bank which would be subject to the same subpœna. He must make his deposit somewhere and the books of one bank would be as likely to be overhauled as another, so there would be no inducement to remove the deposits. If it would not cause the deposits to be removed it would not impair the Complainant's franchise.

A witness duly summoned is bound to make extraordinary efforts to attend.

People vs. Davis, 15 *Wend.*, 602.

It is no ground to refuse to produce written evidence in the pessession of the witness that it is private.

Barnham vs. Morrissey, 14 *Gray*, 226.

If private papers can be brought into Court in a suit between citizens, on the ground that a suitor's right to a just

decision, is higher and greater than a person's right to conceal evidence which he has in his possession, for how much stronger reason should a corporation organized solely for the purpose of making money, be compelled to bring its evidence into Court when the question is between the people of a State and individuals who are trying to hide away their property to avoid taxation.

If the bank can refuse to bring in its books, and deprive a party of the information they contain, regarding the point at issue, in a case where the people of a whole State are interested and affected, *a fortiori*, they may refuse when an individual only is effected.

Now let us examine a case and see where we would be left if such a rule should obtain.

Suppose a matter was pending in the Probate Court in which an executor, adminstrator, or trustee, was being required to settle his account with a minor, who had filed exceptions to his account and the question arose how much money was deposited at a certain time in a certain National Bank in the name of said executor, administrator or trustee, and which was claimed to be trust funds, can it be doubted that the cashier or bookkeeper could be brought into Court with the books of the bank to show the amount, and compelled to testify ?

If it was a Youngstown National Bank I suppose it would go up to Cleveland and get an injunction. It would have as good ground to stand on as this injunction has, and better,

for the interests and rights of all the people are higher and greater than those of an individual.

ANOTHER CASE.

Suppose a suit was pending in the Court of Common Pleas and a garnishee process was sued out and served upon a National Bank, to reach certain funds of the defendant, deposited therein, no one would claim in that case that the bank could legally prevent its cashier or bookkeeper from obeying the subpœna, and answering as to the amount of the deposit and if he could not or would not answer without the books, the books could be brought into Court.

But if twenty of the accounts of the bank's depositors (and a part of them stockholders,) were garnisheed on the same day and the cashier was required by a subpœna *duces tecum* to bring the books of the bank into Court, then "the business affairs of the bank would be unlawfully exposed and public confidence in it as a depository of money would be lessened, and its deposits would be diminished, and the value of its franchise greatly impaired."

The books of the bank were not to be brought in for inspection, but only to assist the unwilling witness to testify. It was the testimony of the witness which was wanted, not the books for inspection, but if the books were in Court the witness would not be able to say, "I cannot answer without the books," or if he did he would be directed to refresh his memory by the books and testify. It does not follow because the books were to be brought into Court that they were to be

inspected, but it does follow that with the books in Court the witness could not deprive the Court or Auditor of his testimony as to the balances of account of certain persons in the bank on the day preceeding the second Monday in April

2. *Had Complainant no adequate remedy at law?*

If it were illegal to subpœna a cashier or other officers of the bank to bring in the books, the State Courts could as well decide that question as the United States Courts. Is the United States Court any more the guardian of the rights of citizens and corporations than State Courts? Could not this question be easily tested at law in the State Courts by refusing to obey the subpœna, and allowing an order for contempt to issue, and then by proceedings in error or *habeas corpus* have the questions passed upon by the Court of Common Pleas or a Judge thereof, who would have power to stay proceedings until a decision was reached. If so, they had an adequate remedy at law. And what practicing lawyer in Ohio is there, who does not know that the remedy at law in such a case is both full and complete.

Now this disposes of all the allegations in the Bill of Complaint upon which the injunction was asked, and the demurrer and motion to dissolve were therefore rightly sustained.

IV.

Although the Court sustained the motion to dissolve the injunction without examining the affidavits and testimony on file, this Court, even if it comes to the conclusion that the

Court erred in so doing, will examine the whole record to see if the Court would not have been compelled to sustain the motion to dissolve the injunction upon consideration of the affidavits and testimony. The whole record is before this Court, and the motion asks that the decree below be affirmed, and although this Court might differ with the Court below on the ground upon which it rendered its decision, still if it, upon an examination of the whole record must come to the same conclusion, that the injunction should be dissolved, this Court will not hesitate to affirm the decree of the Court below.

Now what are the facts contained in the record?

STATEMENT OF FACTS.

Prior to July 7th, 1880, the Board of Equalization had made complaint to the Auditor of Mahoning County, Ohio, that the returns of the assessors of the city of Youngstown in said county showed a very small amount of personal property and money listed for taxation, and especially when compared with amount of deposits returned by the banks, a very large amount, apparently of taxable property and money in said city and county was not listed for taxation, and complaining that the taxpayers of said county, as a whole, were thereby greatly injured and defrauded, giving names of persons whose property should be investigated, and asking him to proceed under the laws of Ohio to remedy the wrong. (See page 11 Rec., affidavit of Auditor.)

James B. Hughes, then Auditor, thereupon began an examination under section 2782 of the Revised Statutes of Ohio,

1880, and issued a summons to the cashiers of the three National Banks of Youngstown and to the private Bank of Wick Bro. & Co., organized and doing business under the laws of Ohio in said city, giving to each of the cashiers summoned the names of the depositors of each of said Banks whose deposits he wished to ascertain, on the day preceding the second Monday of April, 1880, and all of them being persons who had made returns to the assessors. (See Summons, page 16 Rec., and names of depositors of each Bank on page 17 Rec.)

This summons was duly served upon the persons to whom it was directed. In answer to it they came before the auditor, and, being sworn, said that the persons whose names were mentioned in the summons were depositors of the respective Banks specified, but they could not tell who had balances, or how much they were on the day preceding the second Monday in April, 1880, without the books of deposits of the respective Banks, and they refused to bring in the books or record of deposits. (See affidavit of auditor, pages 16 and 17 of Rec.)

Thereupon, the auditor, filed his precipe and request in the Probate Court, asking for subpœnas *duces tecum* as required by section 2783 of the Revised Statutes of Ohio, which was entitled, "In the matter of the examination of returns "of the assessors of the city of Youngstown, Ohio, and the "county of Mahoning, Ohio, for the year 1880." Then follows the precipe (see page 14 of Rec.) which was filed in the Probate Court, and from that time became a proceeding in said Court. Thereupon, the Probate Judge, issued his subpœna *duces tecum* (see page 15 of Rec.,) for the several cash-

iers, requiring them to attend on the 26th day of June, 1880, and bring with them the books containing the records of deposits in the several Banks on the day preceding the second Monday of April, 1880; and to testify regarding the matter in hearing.

Instead of obeying this subpœna in person, they all appeared by attorneys in the Probate Court, and all of said three National Bank cashiers and said private Bank filed a motion (having made common cause) to dismiss the proceedings, which motion will be found on page 18 of record. This motion was heard and arguments made by the attorneys for the several Bank Cashiers and by attorneys for the Auditor, on June 26th, 1880. The Court, as appears by journal entry on last named page, held it under consideration until June 28th, 1880, at nine o'clock, to which time the hearing was continued. At this time the Probate Court decided the matter and overruled said motion. (See journal entry, page 18, folio 45 of record.) The hearing, as appears by the journal entries following, was continued upon the motion of the Auditor to July 29th, and then by consent of parties to July 5th, and again by consent of parties to July 12th, when the following entry is made in the case upon the record of the Probate Court:

"Proceedings having been commenced in the United States Circuit Court for the Northern District of Ohio, by injunction, this matter is continued until the 6th day of August, 1880, at 9 A. M."

Three separate suits were commenced in the United States Circuit Court, at Cleveland, against the said Auditor and

Prosecuting Attorney, viz: By the First, Second and Mahoning National Banks of Youngstown, and a temporary injunction in each of them obtained, and these are the cases now in the Supreme Court.

On the 31st day of July, 1880, the transcript of the proceedings in the Probate Court was required to be filed, with the affidavits in support of the motion to dissolve the said injunctions in said Circuit Court, and it was made up to that time, and is as published in the record. When the said 6th day of August arrived the case was again adjourned indefinitely to await the disposition of the injunction, and still awaits the action of this Court.

The hearing of the injunction before Judge Baxter did not occur until at the January Term of said Circuit Court, and in the meantime Auditor Hughes' term expired and Freeman H. Sherer was elected as his successor and took possession of the office. Thereupon the Court, upon application, required the said Banks to file a supplemental petition making said Freeman H. Sherer a party defendant. (See pages 20 and 21 of the record.

It will be seen by the affidavit of Auditor Hughes (page 11 record) that Monroe W. Johnson, Prosecuting Attorney of the County of Mahoning, had nothing whatever to do with the case except as attorney for said Auditor, and there is nothing in the record denying this statement; also that the Auditor did not seek or threaten an inspection of the books of the Banks, but subpœnaed the Cashier with the books so

that the witnesses could themselves inspect the same, and answer intelligently the questions asked them. (See page 12, folio 31.)

That no proceedings or threats of proceedings for contempt were ever had or made, and that said witnesses were never sworn by or before said Probate Judge, but appeared and proceeded by motion to irregularly try to dismiss the proceedings, as appears in the record. (See page 18.)

On page 10 of record will be found, also, the affidavit of M. W. Johnson, Prosecuting Attorney and attorney for the Auditor, who swears to the truth of the matters and things stated by Auditor Hughes in his affidavit. The record of the Probate Court is both sworn to by the Judge and certified to by him under the seal of the Court. (See page 19 of record, folios 46 and 47.)

The above contains substantially the facts set forth in the affidavits and testimony filed in support of the motion to dissolve the injunction.

To oppose this there is nothing save the allegations in the Bill of Complaint, which alone could be considered of but little weight upon the trial of the motion. Nothing was filed to controvert the facts sworn to in the affidavits and transcript of the record of the Probate Court, and the affidavits and testimony traversed and controverted every material allegation in the Bill of Complaint. So that if the Court had come to a consideration of the affidavits and testimony in this case, the Appellants would have been even worse off than at present.

ARGUMENT UPON THE FACTS.

1. Now let us look at these facts and see if the same result would not have necessarily been reached if they had been considered.

After an inspection of the record of the Probate Court in this matter, can it be claimed that this was not "*a proceeding in a Court of Record of the State of Ohio.*"

The case is docketed, a motion filed, testimony and arguments of counsel are heard, the motion is overuled and continuances are had by consent of parties. What more can be done in any case? And the investigation was to go forward under the direction of the Probate Court and would have gone forward but for the illegal interposition of United States Court at Cleveland. They say as a cause and reason why they should not answer and give the testimony their books contain, "that the necessary result of this investigation will be to unlawfully expose the business affairs of said Banks, lessen public confidence in them as depositories of moneys, to diminish their deposits, and greatly impair the value of the franchises with which they are invested."

Now in view of the fact that the law of Ohio requires that all the information which they seek to conceal, and which the Auditor desired to obtain, should have been given under oath to the assessors, and when we consider the fact that perhaps no one, except these depositors who had sworn falsely to the assessors, would complain if the books were brought in. It

is hard to see just how such alarming damage could possibly follow to the banks.

If every anti-taxpaying depositor had made an honest return of his property under oath to the assessor, neither he or the bank need fear exposure. There could then be no exposure. Nothing would or could have been divulged by this proceeding that was not already known and upon the records in the office of the Auditor and Treasurer, if these certain named depositors had sworn to the truth, and if they had not should a Court of Chancery draw the screen of protection and secrecy over their fraudulent transactions by which they had attempted to defraud all the people of the county and State?

The Court will not overlook the fact that this is not a proceeding for the protection of the banks. They need no such protection. It is the banks, acting for and in behalf of their depositors and stock-holders who have failed to make honest returns of their property to the assessors. By maintaining this injunction, the only benefit will accrue to these men who have violated their oaths and who fear that this proceeding will cause their exposure and punishment. If they are successful in using the banks for this purpose, they will have accomplished that which the law abhors—that is "they will have taken advantage of their own wrong," and that too against the public interest and public weal.

This is a question between the people of Mahoning County and of Ohio, represented on one side by the Auditor, and these corporations on the other. It is of the highest importance that the revenues of the State be collected, and it is the duty

of the Courts to assist, rather than obstruct and prevent the collection of the revenues of the State, and when it becomes a question between the people of a state, and a corporation organized solely for the purpose of making money, as to which shall suffer, then the interests of these corporations must give way to those of the people.

If a proceeding by injunction was the proper remedy, why did not these banks make application to a judge of, or to the Court of Common Pleas? Certainly if the United States Circuit Court had jurisdiction, a State Court would have also. The proceeding shows that the purpose was in some way legal or illegal, to prevent the disclosures of fraud which an examination of the deposits would have shown. If they could do nothing else they sought delay, and that, they have in a measure obtained. It remains to be seen whether the Supreme Court will throw around them its shield and protection. The purpose and fraud of these depositors are both apparent.

"*The people will not deposit in these Banks.*"

This is one of the allegations in the Bill upon which they rely. Where, then, will they deposit? In safes they keep in their houses? Not in Mahoning County. That has lately been tried there with not very flattering results as to safety. Burglars are found to be more dangerous there than assessors,—and the deposits will be made in the banks. I do not expect that men who have so long and successfully evaded taxation upon their money, will not remove it from the banks on the day preceeding the second Monday of April, but it will go in again

the next day, and when the bank books assist depositors and stockholders in their hiding, instead of exposing them, it will be entirely legal to bring them into Court.

There is a great and important principle involved in this case. If the Supreme Court promptly decides this case, affirming the Court below upon the question of the right of the Auditor to bring books of deposits of banks into court for the purpose of evidence against those attempting to defraud the revenue, no disaster will occur to the banks but great good will accrue to all the people. Honest returns will be made to the assessors, and the property of the wealthy will find its proper place upon the tax duplicate and it will be made to share the common burden.

W. C. McFARLAND,

Counsel for Appellees.

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SUPREME COURT U.S.
FILED
MAY 1 1902
JAMES H. McKENNEY

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK of Youngstown, Ohio, Appellant,

VS.

JAMES B. HUGHES, Auditor, FREEMAN H. SHERER, present Auditor, and MONROE W. JOHNSON, Prosecuting Attorney of Mahoning County, Ohio, Appellees.

Brief of SIDNEY STRONG, Counsel for Appellant.

Submitted on Motion of Appellees to dismiss the Appeal.

In the Supreme Court of the United States.

THE FIRST NATIONAL BANK of Youngstown, Ohio, Appellant,

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Brief of SIDNEY STRONG, Counsel for Appellant.

Submitted on Motion of Appellees to dismiss the Appeal.

I. The determination to be finally made of the motion filed by appellees to dismiss the appeal to the Supreme Court depends, perhaps, only on the answer to the question whether the matter in dispute exceeds the sum of five thousand dollars. As regards this question, should the Court find that jurisdiction of this Court on appeal is not shown by the record, it appears clear that affidavits may be used to show the jurisdiction.

Williamson v. Kincaid, 4 Dall. 20.

Course v. Stead, 4 Dall. 22.

And the Appellant asks, in such case, that the Court will give it leave to take affidavits, within such time as may be pre

scribed by the Court, to prove the jurisdiction, and it has placed on file a motion for such leave.

II. I proceed briefly to argue that the Circuit Court had jurisdiction, though that question may not be important to a decision of this motion, which is a motion to dismiss the appeal, not to dismiss the action.

"The Circuit Courts shall have original jurisdiction of all "suits by or against any banking association established in the "District for which the Court is held under any law providing "for national banking associations."

Section 629 of the Revised Statutes of the United States.

The only objection to the jurisdiction of the Circuit Court that I understand is urged, is that an action or proceeding was pending in the Probate Court of Mahoning County and that the injunction asked for was an injunction of the Probate Court.

But no injunction of the Probate Court is asked for by the Bill. The injunction was asked against the Auditor of Mahoning County and his adviser and abettor, the Prosecuting Attorney. The bank might have filed its bill for injunction against the Auditor before he had applied to the Probate Judge for the subpœna, and it is hard to see how the fact that the application had been made and the subpœna issued prevented the Circuit Court from taking jurisdiction of the Auditor and his acts.

I ask a careful inspection by the Court of Sections 2,782 and 2,783 of the Revised Statutes of Ohio, as they appear in the Bill on pages 1 and 2 of the printed record. It is clear that the acts authorized by Section 2,783 are only ancillary. The Probate Judge is to issue a subpœna at the request of the Auditor, but it does not appear that as a judicial officer, as the Probate Court, he obtains jurisdiction of any persons or of any subject matter. It is still a proceeding before the Auditor and has no larger scope than had the original proceeding before him

prior to his application for a subpœna. It is not a proceeding in the Probate Court. I am aware that a proceeding in a Court may be distinguished from an action, but in either there must be a subject matter of which the Court has jurisdiction and there must be power in the Court to make a final order regarding the subject matter. But the Probate Judge is not authorized by the statute to make any determination of the subject matter of the enquiry or any order regarding it. He is simply and only empowered to cause witnesses to appear and testify for the benefit of the Auditor.

The action authorized to be taken by the Probate Judge in the production of witnesses is like that authorized to be exercised in case of an arbitration under the Ohio statutes, by the Clerk of the Court of Common Pleas or by a Justice of the Peace for the production of witnesses before the arbitrators.

Revised Statutes of Ohio, Sections 5,604, 5,605.

These Sections provide that process for witnesses may be issued by the Clerk or Justice, and that failure to appear or refusal to answer by one under process to appear as a witness shall be a contempt of the Court from which the process issued. But the proceeding is clearly one before the arbitrators and not one pending in the Court of Common Pleas or of the Justice from which the process issued.

Again, it is submitted that a proceeding in a Court implies parties to be proceeded against, or at least to be bound by the action or order of the Court. But as the Probate Judge is not by this statute authorized to make any order regarding the subject matter of the enquiry, so no one is bound by the action of the Judge in regard to such subject matter.

The only party is the Auditor, and he is not bound by anything that transpires before the Probate Judge. Whatever is done in the premises after the examination of the witnesses

brought in by the Subpœna of the Probate Judge is done by the Auditor on his own motion and under the restraints and limitations which govern him as an executive officer and under no liability to the Probate Judge. The only party to the so-called proceeding is in no way bound by it. The Auditor, an executive officer, sets a proceeding in motion without reference to the Probate Court. He concludes it and acts finally in the premises only as an executive officer, and amenable in no regard to that Court. His intermediate application for the aid of the Probate Judge in the production of the witnesses does not, I submit, make a proceeding in the Probate Court.

No argument of the case on its merits is called for by the pending motion and so none is offered. The appellant does not in any way oppose the alternative part of the motion which asks that the cause may be advanced for early argument and determination.

But in order to show the good faith of the bank in bringing the action, I may be pardoned for here referring the Court to the allegation in the Bill (printed record, page 3) that all of the acts already done by the Auditor or threatened to be done are prohibited by Section 5,241 of the Revised Statutes of the United States and that the threatened production of the books of the bank before the Auditor or Probate Judge is not authorized by Sections 2,782 and 2,783 of the Revised Statutes of Ohio, also set out in the Bill; and for suggesting that it is at least a grave question, under either the federal or state statutes, whether the books of the bank could be compelled to be produced before the Auditor and its business thus publicly exposed.

Respectfully submitted.

SIDNEY STRONG,
Counsel for Appellant.